Supreme Court, U.S.
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No. 99-1711

In the

Supreme Court of the United States

CALIFORNIANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,

Petitioners,

versus

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

MALISSA HATHAWAY MCKEITH
LOEB & LOEB LLP
1000 Wilshire Blvd
Suite 1800
Los Angeles, CA 90017-2475
(213) 688-3400

MARINA TRAMONTOZZI
Counsel of Record
c/o CURRY & TAYLOR
Suite 601-S
815 15th Street, N.W.
Washington, D.C. 20005
(202) 393-1070

LARRY D. SANDERS
SIERRA DEFENSE PROJECT
c/o SYRCL
P.O. Box 841
Nevada City, CA 95959
(530) 265-5961

DENNIS P. DERRICK
Of Counsel
Seven Winthrop Street
Essex, MA 01929
(978)768-6610

Attorneys for Petitioners

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INTRODUCTION

This is a civil rights case about government corruption for personal gain resulting in irresponsible decisions exposing Petitioners' families to substantial injury and property damage. Challenges to the removal of the Deer Creek Levee by several homeowners' groups, environmental organizations, and Petitioners has caused significant controversy, because these challenges threaten to halt hundreds of millions of dollars of development that cannot proceed if the flood infrastructure is unsafe.[1] A finding that the flood infrastructure is unsafe also will force Respondent, the City of Rancho Cucamonga ("City") to disclose to tens of thousands of people that they are living in a dangerous flood plain and that they must purchase costly flood insurance. The local political opposition to conducting an independent safety study is fierce, and the tactics employed by public officials to prevent that study and unconstitutional. Simply put, the wrongful conduct at issue in this matter affects the safety of literally thousands of people, and it deserves review by this High Court.

When the underlying complaint was stayed by the District Court and subsequently briefed to the Ninth Circuit, Petitioners did not know the magnitude of Respondents' malfeasance. As such, the underlying complaint did not allege the strongest ground for federal jurisdiction – namely a violation of substantive due process. Instead, the complaint was couched in terms of procedural due process violations based upon the City's failure to provide any due process when the City extended the developer's tentative tract map in 1992, 1995 and 1996. It also alleged multiple violations of the California Public Records Act. By the time of the District Court hearing on the motion to dismiss in December 1997, Petitioners naively believed that the City had turned over all relevant documents based upon the

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[1] The Deer Creek Levee ("Levee") blocks development of thousands of acres mostly owned by the flood control district as its height of 20 to 40 feet prevents east/west access across the foothills. Although funded by the federal government, the Levee's destruction is in the hands of local politicians with financial interests in the development.

representations of their counsel. In reality, the City intentionally had concealed the very most critical documents confirming that the Deer Creek Debris Basin and Channel were dangerous and that the City knew it.

Due to the limited nature of Petitioners' procedural due process claim, the District Court stayed the lawsuit and abstained from deciding the merits on the grounds that California law was unclear as to whether Petitioners' had a state recognized protectible property interest triggering the right to procedural due process.

On appeal, Petitioners argued that abstention was inappropriate, because the trial court could predict with some degree of certainty how the California Supreme Court would decide that Petitioners' had a protectible property interest based upon a long line of state court cases upholding the due process rights of adjacent property owners.[2] The abstention doctrine articulated in *Railroad Commission v. Pullman Co.*,[3] is a narrow exception to the district court's duty to decide cases properly before it and is proper "only in exceptional cases where principals of comity and federalism justify postponing the exercise of jurisdiction that Congress conferred upon federal courts." *Pearl Investment Co. v. City of San Francisco*, 774 F.2d 1460 (9th Cir. 1985). In *Pearl*, the Court stressed that a district court should exercise jurisdiction unless it "cannot predict with any confidence how the state's highest court would decide an issue of state law." *Id.* at 1462. As the California Supreme Court historically has been a leader in upholding the rights of citizens to due process in government proceedings, Petitioners argued that clear precedent existed for recognizing a protectible property interest particularly given the severity of the safety issues involved.[4] From a policy perspective, Petitioners further

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[2] See Lodging Section V.

[3] 312 U.S. 496 (1941).

[4] Importantly, none of the Ninth Circuit's decisions upholding *Pullman* abstention are remotely on point. The most applicable decision, *Lapham v. California Energy Resources Conservation & Dev. Com.*, 705 F.2d 358 (9th Cir. 1983), merely involved whether Petitioners had a right to due process before an electrical transmission line was installed near their homes.

argued that the District Court should be even less inclined to abstain in civil rights cases where the Petitioners would end up before a court biased by local politics. See Field, Abstention in Constitutional Cases: The Scope of the *Pullman* Abstention Doctrine, 122 U. Pa. L. Rev. 1071 (1974) (The state procedure should be deemed inadequate when individual litigants suffer substantial prejudice in addition to that accompanying the delay.).[5] Finally, Petitioners asserted that, even if abstention were appropriate, the Ninth Circuit should certify the matter to the California Supreme Court as doing so provided the most expeditious remedy for vindication of Petitioners' civil rights. Where certification is available, this Court consistently has held that it is preferable over abstention. *Lehman Brothers v. Schein*, 416 U.S. 386 (1974); *Bellotti v. Baird*, 428 U.S. 132 (1976).[6]

The Ninth Circuit held that there was sufficient uncertainty about the applicable state statute that the trial court had not abused its discretion. Unlike the instant case, however, absolutely none of the Ninth Circuit decisions contained allegations of unlawful or corrupt conduct on the part of the very decision-makers involved.

[5] One case, Attorney Kaufman falsely asserted that the Deer Creek Channel was designed to convey ("pass") flood flows of 15,000 cubic feet per second. Mr. Kaufman made this false assertion though three separate documents in the City's possession listed 5,400 cubic feet per second as the maximum capacity of the Deer Creek Channel, prior to convergence with other streams. Petitioners attempted to submit these design documents verifying the channel capacity as only 5,400. Were the court impartial, it would have corrected the record and likely reprimanded the City. Instead, the judge in his decision issued as a specific finding that the Deer Creek Channel has a 15,000 cubic foot per second capacity.

[6] Arguments before the Ninth Circuit in January 2000 included a lengthy discussion of *extra record* evidence about the status quo surrounding removal of the FEMA-rated Deer Creek Levee. Specifically discussed was the fact that Senator Feinstein and Senator Boxer had just demanded that the Secretary of Army conduct the very safety study Petitioners had been requesting. At that time, it was assumed that the Pentagon would conduct the safety study in response to the Senators. Saving the Levee, however, is but one of the forms of relief sought in the underlying civil rights case. Petitioners also seek to vindicate the significant deprivation of rights that has occurred by virtue of their inability to obtain an independent safety study due to local corruption; the monetary effect on Petitioners having to spend

The Ninth Circuit did not address the substantive due process argument applicable to this matter, as it had not been advanced at the trial court or in the Ninth Circuit briefs. The extent of the City's wrongdoing simply was unknown in 1997, when the District Court stayed the action. Had Petitioners known of these facts, they could have amended their complaint to add a claim for deprivation of substantive due process rights.

For the above reasons, Petitioners request that this Court reverse the District Court's decision on abstention or, alternatively, that the Ninth Circuit be directed to certify the case to the California Supreme Court. Petitioners further request that the case be remanded to permit the amendment of the complaint to add a claim for violation of substantive due process. This Court has long recognized that citizens possess certain fundamental rights that no government should infringe. The right to be safe in one's home unquestionably is such a fundamental right.[7]

I. SUFFICIENT FACTS ARE NOW KNOWN TO STATE A CLAIM FOR DEPRIVATION OF SUBSTANTIVE DUE PROCESS.

Petitioners request that this Court permit amendment of the complaint to include a claim for substantive due process. Given Petitioners' request, a further factual background is necessary to place this matter in its proper context. Although many of these facts were alleged in the underlying complaint; significant new evidence has been discovered in the past three years supporting claims against additional individual defendants including the City Engineer, the City Attorney, and employees of the County Flood District. The following facts would be alleged in an amended complaint.

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hundreds of thousands of dollars to secure those rights; and the fact that there remains no guarantee that the levee will not be demolished regardless of the Senators' help, thus jeopardizing Petitioners' right to be safe in their homes.

[7] *Rochin v. California*, 342 U. S. 165 (1957). See also, *Brennan v. Stewart*, 834 F.2d 1248, 1255-57 (5th Cir. 1988); Monaghan, Of "Liberty" and "Property", 62 CORNELL L.Rev. 405, 420 (1977). Substantive due process is the "heavy artillery of constitutional litigation . . . " *Steuart v. Suskie*, 857 F.2d 1148, 1150 (8th Cir. 1989).

In 1990, the City approved 40-home development based upon a negative declaration The negative declaration – the document under State law alerting the public to environmental and safety concerns -- was completely silent about the Deer Creek Levee's removal. Indeed, there was not a single public document alerting the community to this fact.

None of the Petitioners lived in the area in 1990. Petitioners first learned of the impending removal of the Levee in late May 1997, long after they had constructed their homes. Counsel for CURE immediately served a Public Records Act Request with defendant Grahn. At that time, the Planning Commissioner, David Barker, instructed respondents Buller and Grahn not to produce certain documents to Petitioners, because doing so would prevent Petitioners from properly preparing for the June 11, 1997 public hearing. Defendant Grahn also falsely told the community that the Levee was not being removed, and further informed people that the matter was on the Consent Agenda so that no public input would be permitted.

The response to Petitioners' Public Records Act request was paltry, and several material documents obviously were omitted including documents concerning the City's Memorandum of Agreement with the United States Fish & Wildlife Service restricting development in areas of sensitive habitat. Moreover, there were absolutely no documents produced concerning the safety issues surrounding removal of the Levee. On June 11, 1997, the Planning Commission continued the matter to July 9, 1997. Thereafter, counsel for Petitioners made several efforts to contact City Attorney James Markman by letter and telephone to seek his assistance in obtaining documents. No response was forthcoming.

In filing the original complaint, Petitioners were attempting to force the City to produce the relevant documents before the July 9, 1999 hearing and to ensure the City understood that the residents would do whatever was necessary never to counter the City's unsafe actions. The documents were not received and the Planning Commission, chaired by Mr. Barker, granted the developer's permits. An appeal to the City Council ensued. Prior to the City Council's hearing on August 20, 1997,

a number of documents were produced, and Petitioners believed that the City had complied. It was only discovered literally 15 months later that the City had withheld and concealed numerous specific documents about the flood infrastructure proving that the City had knowledge that the situation was unsafe. None of those documents were available in August 1997.

In August 1997, a City Council member receptive to conducting further environmental review, questioned the City Engineer, whether removal of the Levee was safe. In response, the City Engineer falsely represented that he had "no idea" about the capacity of the Levee, that no one knew "who built it" and that it was a "mound of dirt". Unknown to Petitioners at that time, the City Engineer had documents within his very files reflecting that the Army Corps of Engineers had made improvements to the Levee in the early 1970s and 1980s, and that FEMA had credited the Levee to handle a 100-year flood event in 1984, one year before the San Bernardino County Flood Control District sold it to a private developer and six years prior to the City approving its removal.[8]

Based upon this evidence, the City Council held that no further environmental review was necessary. The City points out, correctly, that Petitioners were able to challenge that decision on an Administrative Writ of Mandate, and that the trial court upheld the City's decision. These mandate proceedings are based upon a limited administrative records and, under California law, the trial court must defer to the City Council if there is any

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[8] Attorney Kaufman falsely characterizes the Levee as an "unlined, training levee" that was breached before the City approved its grading in 1990. (Respondents Brief at n 2). This is simply false. The Levee was breached in 1992 in a rip-rapped re-directional (i.e., training) levee, designed to turn and convey high velocity flood & debris flows. Even the developer estimated the Levee can handle more than 257-acre feet or 500,000 tons of debris and 72,000 cubic feet per second. The Levee is substantially larger than the alternative trapazoidal "channel" referenced by the City at page 3 of their brief. That channel – as counsel well knows – is designed to handle 474 cubic feet per second only or .6 percent of the Levee's capacity. Even if it would hold one percent of what the Levee holds, Petitioners take no solace in such a "replacement".

evidence to support its holding that no additional environmental review is required. The remedies in these mandate cases, moreover, are vastly different than what Petitioners pray for in a federal civil rights action. Under mandate, the trial court does not address any of the bad faith conduct of the City or the individual defendants (none of whom can even be named in mandate cases), including the concealment of documents demonstrating the City's knowledge that removal of the levee was dangerous, and intentionally false statements by the City (and its attorneys) about the capacity of the flood channel. No discovery is permitted at either the City Council or trial court stages so that it is impossible to cross-examine or rebut witnesses or delve into the financial bias of the decision-makers. No jury trial is available and no monetary damages can be awarded.

II. DEFENDANTS CONDUCT IS FUNDAMENTALLY UNFAIR AND BASED UPON AN IMPROPER MOTIVE IN VIOLATION OF PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS.

Without question, Petitioners enjoy a substantive due process right to be free from government action that would render them unsafe in their own homes. Substantive due process affords "a general prohibition against arbitrary and unreasonable governmental action." *Thompson v. Gallagher*, 489 F.2d 443, 446 (5th Cir. 1973). See also, *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1968) (substantive due process "stems from our American ideals of fundamental fairness . . . [which] enmeshes the judiciary in substantive review of governmental action.") It is the "heavy artillery" of constitutional litigation . . ." *Steuart v. Suskie*, 867 F. 2d 1148, 1150 (8th Cir. 1989).

Although this Court has witnessed a resurgence of substantive due process claims where government officials have engaged in wrongful conduct impacting a plaintiff's fundamental rights, its roots date back to the earliest days of our union. "The people of the United States erected their Constitutions . . . to establish justice, to promote the general welfare, to secure the blessings of liberty; and *to protect their persons and property from violence.*" *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 3867

(1798). "Substantive due process grew out of the natural law theories of the Seventeenth and Eighteen centuries. All men were thought to be possessed with certain fundamental rights that no government should infringe." D. Hagman and J. Juergensmeyer, Urban Planning and Land Development Control, § 10.2 at 296 (2d ed 1986).

Substantive due process rights are not dependent upon property rights under state law. Rather, substantive due process affords plaintiffs a broad residual theory to challenge the root of governmental conduct and typically affords remedies consistent of compensatory and punitive damages along with equitable relief where appropriate. *See* V. FONTANA, MUNICIPAL LIABILITY: LAW AND PRACTICE § 4.8 (1990).

Government conduct premised upon bad faith or other improper pecuniary motives undisputedly supports a claim for violation of Petitioners' due process rights. The notion that government employees empowered to protect the health and safety of their community, would conceal and destroy documents demonstrating unsafe conditions satisfies the "shocks the conscience" test employed to ascertain the appropriateness of such a claim regardless of whether it involves local land use decisions. No special deference is provided government employees simply because the matter involves land use. *Altaire Builders, Inc. v. Village of Horseheads*, 551 F. Supp. 1066, 1069 (W.D.N.Y. 1982) ("Regardless of the deference normally accorded zoning practices by the courts, the Constitution does not tolerate arbitrary and unreasoned action.") The Ninth Circuit also has applied substantive due process in the land use context. In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), the Ninth Circuit observed that "arbitrary administration of the local regulations, which singles out one individual to be treated discriminatorily, amounts to a violation of that individuals substantive due process. *See Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988) (reversing summary judgment for city; building permit denial as a result of political animus violates substantive due process.) See also, *Bellow v. Walker*, 840 F.2d 1124 (3rd Cir. 1988) ("substantive due process available where municipality had improperly interfered with the permit process,

and did so for partisan political or personal reasons unrelated to the merits of the application.")

Here, defendants' conduct in concealing information and then ruling against performing a safety study allegedly is motivated by factors unrelated to the merits of the permit process. Certainly, individual property owners impacted by those decisions have no less right to a substantive due process claim then the permittee. Having alleged that the government officials in this case have acted wrongful, Petitioners have demonstrated a substantive due process violation

III. THIS COURT MAY PERMIT AN AMENDING OF THE COMPLAINT ON APPEAL

Federal Rule of Civil Procedure, Rule 15(a), declares that leave to amend a complaint "shall be freely given when justice so requires." As this Court has stated on numerous occasions, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given'." *Forman v. Davis*, 371 U.S. 178, 82 (1962). No factor limiting the right to amend are present here.

In the context of a civil rights action, the Seventh Circuit held that the "amendment [of a complaint] can be allowed with leave of the Court of Appeals. [Citations omitted]. This may be accomplished either by the appellate court itself granting leave to amend or by remanding to the District Court to consider the motion." *Cohen v. Illinois Institute of Technology*, 581 F.2d 658, 62 (7th Cir. 1978). The Eighth Circuit Court of Appeal also has held that "[a]n amendment can be proper after remand to the District Court even if the claim was presented for the first time on appeal or had not been presented to the District Court in a timely fashion." *Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir. 1983) (reversing summary judgment and directing trial court to permit amendment of pleading even though theory

not raised below). In *Howard*, the appellant made his first specific reference to a tort theory of recovery on appeal, independent of his original contract claim. The Appellate Court ordered "[i]f the District Court did not rule on Howard's tort claim, that court should consider the claim in the first instance. If the court feels the issue had not been presented below, the court can permit Howard to amend its counterclaim pursuant to Fed. R. Civ. P. 15(a) to include the tort claim." *Id.*

Recognizing the liberality with which amendment is granted under Fed.R.Civ. Proc. Rule 15(a), Petitioners urge this Court to permit amendment now.

IV. CONCLUSION

The United States Supreme Court has the power to assume jurisdiction and to address Petitioners' constitutional rights. This is not a local land use case but a case about the wrongful conduct of government officials. The existing and proposed amended complaint is an indictment of those local officials and politicians who would recklessly endanger the public safety simply to line their own pockets. Petitioners have fought this battle at great personal expense to protect their families from unsafe conditions created by the very government entrusted to protect them. Those rights are protected by the federal constitution and should be vindicated in a federal court free from local bias.

For the reasons stated above, Petitioners request that the Petition for Writ of Certiori be granted.

Curry & Taylor
Marina Tramontozzi

By:_____
Marina Tramontozzi
Counsel of Record
Suite 601
815 15th St NW
Washington, DC 20005
202-393-1070